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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1705

J. M. DUNGAN, as Trustee for
ABC TOWING SERVICE OF SALINAS, INC.,
a bankrupt corporation,
Petitioner,

v.

MORGAN DRIVE-AWAY, INC.,
NATIONAL TRAILER CONVOY, INC.,
and TRANSIT HOMES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINION BELOW

The unanimous decision by the Ninth Circuit Court of Appeals, affirming the judgment of the District Court for the Northern District of California, is reported at 570 F.2d 867 (9th Cir. 1978) and is set forth in Appendix

A hereto. The court's Order denying petitioner's motion for rehearing and for rehearing *en banc* was entered on February 28, 1978. (570 F.2d 867.) The unreported opinion of the District Court (Wollenberg, J.) granting respondents' motion for summary judgment is set forth in Appendix B hereto.

JURISDICTION

The jurisdictional requisites are set forth in the Petition (Pet. 2).

QUESTION PRESENTED

Whether this Court should entertain review of a unanimous decision of the Ninth Circuit Court of Appeals affirming the opinion of the District Court which held that the mere empanelling of a grand jury does not suspend the applicable statute of limitations under Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i).[1]

STATUTORY PROVISIONS INVOLVED

The applicable statutory provision is set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner's failure to provide this Court with an accurate statement of facts compels respondents to do so.[2]

[1] Under the 1974 amendments to the Clayton Act, known as the Antitrust Procedures and Penalties Act, Section 5(b) of the Clayton Act, heretofore 15 U.S.C. § 16(b), was recodified as 15 U.S.C. § 16(i) and will be referred to as Section 5(i) in this brief.

[2] Instead of facts, petitioner has provided a two-page statement of allegations, labeled as "facts," citing nothing more than its own unsupported statements to the District Court. (Pet. 3-4; *see* R. 117-18.) Neither the District Court nor the Court of Appeals considered any of these allegations in ruling that the mere empanelling of a grand jury does not toll the applicable statute of limitations. (A 2a; B 12a, 14-15a.)

The salient and undisputed facts of this case, as found by the District Court and relied upon by the Court of Appeals are as follows.

Petitioner, as the trustee in bankruptcy for the ABC Towing Service of Salinas, Inc. ("ABC"), brought this private antitrust action on August 20, 1975, substantially more than four years after April 23, 1969, the date ABC ceased doing business and filed its bankruptcy petition. The filing of petitioner's complaint was, therefore, more than four years after the last day on which the alleged cause of action could have accrued. (A 2a; B 11a.) Thus, under Section 4B of the Clayton Act, 15 U.S.C. § 15b, petitioner's claim was barred on April 23, 1973, because it had not been brought "within four years after the cause of action accrued." (A 2a; C 16a.) In an effort to avoid the statute of limitations, which expired 4 months before a grand jury indictment was returned charging respondents with misdemeanor violations of the Sherman Act, 15 U.S.C. § 1, 2, petitioner contended that the statute of limitations was suspended when the grand jury was empanelled on February 7, 1972.

The District Court rejected petitioner's contention and granted respondents' motion for summary judgment. The District Court held that the empanelling of the grand jury did not toll the statute of limitations, stating:

> A grand jury is an investigative body . . . . Even if indictments are eventually returned, the grand jury itself has no power to 'prevent, restrain, or punish' for violations of antitrust or related statutes. Proceedings before grand juries are not the type of proceedings contemplated by 15 U.S.C. § 16(b) [now 16(i)]. (B 12a.)

On appeal, a unanimous panel of the Ninth Circuit Court of Appeals affirmed. (A 2a.) The appellate court balanced the congressional intent to aid private litigants with the desire of Congress to "make reasonably

certain and predictable the determination of the duration within which a private antitrust suit must be brought," [3] and concluded that:

> [T]here exists little reason, other than it fits the needs of the plaintiff's case, to accept the date of grand jury empanelling as the date suspension commences. The date of the return of an indictment fits comfortably within the statutory language while empanelling the grand jury does not. The latter is not an act having as its purpose the prevention, restraint, or punishment of violations of the antitrust laws. The initiation of an investigation or a decision to prosecute more comfortably fits the statutory language than does empanelling the grand jury. Were we to select empanelling today, these more appropriate times would be selected tomorrow. To select either, however, would introduce great uncertainty in fixing the time at which the suspension period commences. This would frustrate the statute-of-repose purpose of section 16(i). (A 9a.)

The Court of Appeals also observed that "practical difficulties relating to grand jury secrecy" and the burdensome and complex task of requiring the trial court to determine when tolling begins preclude the use of grand jury procedeings for tolling purposes. (A 9-10a.) The court rejected petitioner's suggestion that where no indictment is returned, *in camera* judicial review of the entire grand jury record is required:

> To an impractical degree the plaintiff's position imposes upon the trial court a highly complex and difficult task whereas that task is relatively simple so long as we adhere to the date an indictment is returned as the date criminal proceedings which suspend the 4-year limitation period commence. (A 10a.)

[3] A 7a.

Following this decision by the Court of Appeals, petitioner sought a rehearing *en banc*, contending, as he does in this Court, that the Ninth Circuit's previous opinion in *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), was inconsistent with that court's holding in this case. The petition was denied. (570 F.2d 867.)

ARGUMENT

I. THE DECISION BELOW IS IN ACCORD WITH THIS COURT'S RECENT DECISION IN GREYHOUND CORP. v. MT. HOOD STAGES, INC.

Petitioner seeks review in this Court because he contends that the opinion *sub judice* is inconsistent with the Ninth Circuit's earlier opinion in *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), which held that the intervention by the United States in the ICC proceedings initiated by Mt. Hood against Greyhound tolled the running of the statute of limitations. (Pet. 5.) Thus petitioner contends here that:

> When this Court issues its decision in *Mt. Hood Stages* it will in effect conclude the proper result in this case. (Pet. 9.)

In this respect, petitioner is correct. This Court's subsequent unanimous decision in *Mt. Hood* held that the statute of limitations was not tolled by the filing of the government's petition to intervene in the ICC proceedings. As petitioner concedes, this decision provides "the proper result in this case" and leads inevitably to the conclusion that the petition should be denied. *Mt. Hood* is dispositive of all issues raised by the petition herein.

To arrive at its decision in *Mt. Hood*, this Court relied on the "literal wording" [4] of Section 5(i) as well as

[4] Slip Op. at 7.

the congressional intent that Section 5(i) be a "statute of repose."[5] This Court twice cites with approval the decision by the Ninth Circuit in the present case. (Slip Op. at 11, 13.) In concluding in *Mt. Hood* that the ICC proceeding "simply cannot be viewed as one based on any matter 'complained of' by the United States"; that the "congressional emphasis on certainty and predictability in the application of § 5(i)" rendered the Ninth Circuit's *Mt. Hood* opinion "unacceptable"; and that an expansive interpretation of Section 5(i) "would lead to serious problems," this Court has echoed the *ratio decidendi* of both lower courts in the present case. (*See, e.g.*, A 7a, 9-10a, B 12-13a.) Any vitality the petition may have had is now totally dissipated. Consequently, the petition presents no appropriate issue for this Court to review.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE BEFORE IT.

This Court's decision in *Mt. Hood* reinforces the correctness of the decisions by both lower courts here that the mere empanelling of a grand jury does not toll the statute of limitations. (A 2a, 8a; B 12a.)

A. The Plain Language of Section 5(i) Excludes Grand Jury Proceedings.

Under Section 5(i), only proceedings to "prevent, restrain, or punish violations" of the antitrust laws can suspend the applicable statute of limitations. It is clear that a grand jury is not such a proceeding.

The principle is well established that "the grand jury's purpose is to determine whether cause exists upon which an indictment would lie." *In re Dymo Industries, Inc.*, 300 F. Supp. 532, 534 (N.D. Cal. 1969), *aff'd per curiam*, 418 F.2d 500 (9th Cir. 1969), *cert. denied*, 397 U.S.

[5] *Id.* at 11.

397 U.S. 937 (1970). *See also United States* v. *Calandra*, 414 U.S. 338 (1974); *United States* v. *Symth*, 104 F. Supp. 283 (N.D. Cal. 1952).

As described by this Court in *Branzburg* v. *Hayes*, 408 U.S. 665, 687 n.23 (1972), *citing Wood* v. *Georgia*, 370 U.S. 375, 390 (1962):

> Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

See also Blair v. *United States*, 250 U.S. 273, 282 (1919).

Consistent with that purpose, many grand juries, upon completition of their investigations, do not indict anyone. While petitioner states that non-indicting grand juries should toll the statute of limitations,[6] common sense dictates that such grand juries cannot possibly be proceedings "to prevent, restrain, or punish violations" of the antitrust laws.

Moreover, since the grand jury is an inquisitorial body which itself does not "complain of" anything, there is no way that a subsequent treble damage case could be based "on any matter 'complained of' by the United States." *Mt. Hood, supra*, at 9.

B. Petitioner's Interpretation of the Statute Ignores Congressional Intent.

The Court of Appeals stated:

> Plaintiff in effect argues that any interpretation which will extend the period within which a private

[6] *See* Appellant's Opening Brief in the Ninth Circuit, 27.

> suit can be brought serves to aid private litigants and is thus an interpretation intended by Congress. . . . [T]his ignores the statute-of-repose purpose of section 16(i) (A 7a.)

While the clear language of Section 5(i) precludes the need to determine or apply congressional intent,[7] the legislative desire "to make reasonably certain and predictable the determination of the duration within which a private antitrust suit must be brought"[8] reinforces the interpretation of the lower courts here.

Petitioner does not dispute the "statute-of-repose" intent of Section 5(i), and admits that "the facts presented by this case would present the courts with a factual determination *to be made in each case* as to what set of circumstances constitute 'the pendency' of a proceeding." (Pet. 8; emphasis supplied.) Thus, petitioner would effectively frustrate the will of Congress by replacing one set of "uncertainties" with another. Under petitioner's approach, the courts in each case would have to examine the entire record in a collateral proceeding to determine when a "proceeding" was instituted against a particular defendant. As the Court of Appeals correctly concluded, this would "introduce great uncertainty in fixing the time at which the suspension period commences [and] would frustrate the statute-of-repose purpose of Section 16(i)." (A 9a.)[9]

---

[7] *See Mt. Hood, supra,* at 7-8.

[8] A 7a.

[9] In *Mt. Hood,* this Court refused to apply a "functional equivalent" test to the ICC proceedings because it would "resurrect . . . the very confusion and uncertainty concerning the application of the statute of limitations that Congress sought to eliminate in the 1955 amendments . . . [by requiring] detailed review of the record in each proceeding . . . ." (Slip Op. at 13.)

C. Practical Considerations Preclude Petitioner's Expansive Interpretation of Section 5(i).

Section 5(i) provides that a government civil or criminal proceeding will suspend the statute of limitations only as to private actions "based in whole or in part on any matter complained of in said proceeding." By its very nature, a grand jury investigation cannot satisfy this statutory criterion.

In *Mt. Hood, supra,* this Court stated:

> The cases in which the applicability of § 5(i) has been considered establish that the determination of whether a private action is based on matters 'complained of' in a prior Government action '[i]n general . . . must be limited to a comparison of the two complaints on their face.' (Slip Op. at 9; citations omitted.)

Where an indictment or complaint has been filed, it may still be difficult to determine if the "substantial identity" test of Section 5(i) has been satisfied, but at least the courts and the parties can compare two formal documents. However, the commencement of a grand jury investigation does not require the filing of a complaint or any other formal statement of charges, and there are no established boundaries within which a grand jury investigation must be conducted. *See Michigan* v. *Morton Salt Co.,* 259 F. Supp. 35, 44-45 (D. Minn. 1966), *aff'd on other grounds, sub nom. Hardy Salt Co.* v. *Illinois,* 377 F.2d 768 (8th Cir.), *cert. denied,* 389 U.S. 912 (1967). *Cf. Mt. Hood, supra,* at 8-9.

Moreover, grand jury proceedings are ordinarily secret, and matters occurring therein can only be made public under limited circumstances. *See generally* Rule 6, Federal Rules of Criminal Procedure; *see also Dennis* v. *United States,* 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395 (1959). Pe-

titioner would have district judges "make an *in camera* review of the grand jury transcript in order to determine if § 5(b)[i] could be applied." (Appellant's Opening Brief in the Ninth Circuit, 27.) Thus, voluminous grand jury records would have to be inspected in each case in which a private plaintiff alleged that the statute of limitations had been tolled by a grand jury investigation. As recognized by both courts below, requiring district judges to routinely review voluminous grand jury material is a result which cannot be read into Section 5(i).

The "substantial identity" test of Section 5(i) might be satisfied by an indictment or information, but clearly not by the mere empanelling of a grand jury. Petitioner's arguments to the contrary are contrived at best and plainly misconceive the nature and function of a grand jury. (*See* A 8-9a and B 12-13a.)

CONCLUSION

This Court's unanimous decision in *Mt. Hood, supra,* resolves in favor of respondents and in conformance with the opinions of both lower courts in this case all issues raised by petitioner. No issue remains for this Court to examine, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 28, 1976

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-2681

J. M. DUNGAN, as Trustee for ABC Towing Service of Salinas, Inc., a bankrupt corporation,
Plaintiff-Appellant,

vs.

MORGAN DRIVE-AWAY, INC., NATIONAL TRAILER CONVOY, INC., and TRANSIT HOMES, INC.,
Defendants-Appellees.

[Filed Jan. 13, 1978]

Appeal from the United States District Court for the Northern District of California

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OPINION

Before: HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

SNEED, Circuit Judge:

Plaintiff-appellant Dungan, as Trustee for the ABC Towing Service of Salinas, Inc., a bankrupt corporation, instituted this private antitrust treble damage action on August 20, 1975. It is acknowledged that any such action

accrued no later than April 23, 1969, the date ABC Towing Service of Salinas, Inc. filed its petition in bankruptcy. The cause of action, therefore, appears barred because, as required by 15 U.S.C. § 16(i), it was not commenced "within four years after the cause of action accrued."

To avoid this conclusion plaintiff points to that portion of 15 U.S.C. § 16(a) which suspends the running of the statute of limitations during the pendency of "any civil or criminal proceeding . . . instituted by the United States" and for one year thereafter and contends that the empanelling on February 7, 1972 of the grand jury which subsequently indicted the defendant-appellees, suspended the running of limitations as of that date. This suspension, occurring within four years from the accrual date of the cause of action, should preserve the cause until the expiration of one year following the termination of the criminal proceeding. Inasmuch as these proceedings at the earliest were terminated by the appellees' entering pleas of *nolo contendere* and being sentenced on September 27, 1974, a complaint filed on August 20, 1975 should be regarded as well within the permissible one year.

The defendants, however, insist that the empanelling of a grand jury did not suspend the running of limitations. Only an indictment so functions and in this instance the indictment was issued on August 2, 1973, a date more than four years subsequent to the date of the cause of action accrued. The cause, therefore, should be barred by limitations, the defendants contend.

Accordingly the defendants moved for summary judgment after the above facts were revealed by the complaint and developed through depositions. The motion was granted by the district court. We affirm.

I.

Purposes Served By Tolling Provisions of 15 U.S.C. § 16(i).

Plaintiff rests his case on the purposes Congress intended to serve in enacting those provisions of the Clayton Act which now constitute 15 U.S.C. § 16(a) and (i).[1] Section 16(a) makes final judgments or decrees resulting from civil or criminal proceedings brought by the United States prima facie evidence in any action under federal law brought by a private party against the same defendant. Section 16(i), however, is not limited in scope to being only "a logical backstop for the prima facie evidence clause of 5(a) [15 U.S.C. § 16(a)]" *Minnesota*

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[1] 15 U.S.C. § 16(a) and (i):

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

"(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Mining & Mfg. Co. v. *N. J. Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 1477, 14 L.Ed.2d 405 (1965). Its purpose has been described by the Supreme Court in *Minnesota Mining* as follows:

> "As we have pointed out, the textual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132(e). See generally 16 CFR § 1.131 et seq. Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties."

Minnesota Mining & Mfg. Co. v. *N. J. Wood Finishing Co.*, *supra*, at 319, 85 S.Ct. at 1477. This purpose expresses a "desire that private parties be permitted the benefits of prior government actions." *Id.* at 320, 85 S.Ct. at 1478. Such a purpose, plaintiff insists, in this case can be served adequately only by interpreting the statutory language "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" as embracing the empanelling of a grand jury. Only in that

manner can a private party situated as is the plaintiff here get the full benefits of the government's prior actions.

Although the plaintiff is correct in asserting that 15 U.S.C. § 16(i) serves the broad and beneficent purpose of aiding private antitrust litigants, so as to use "private self-interest as a means of enforcement" of antitrust laws, *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751, 67 S.Ct. 1015, 1019, 91 L.Ed. 1219 (1947), it is also true that it is a statute of repose. This feature emerges clearly when one considers the purposes of the Act of July 7, 1955, 69 Stat. 282, which amended 15 U.S.C. § 16(i) (at that time numbered 16(b)). Prior to this Act § 16(i) merely suspended the running of the limitations period, the limits of which were fixed by state law. This led to considerable confusion in computing the correct period within which a suit was required to be brought.[2]

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[2] S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S. Code Cong. & Admin. News, pp. 2330, 2331.

> "As previously indicated, the antitrust laws grant to private parties the right to bring a suit for treble damages to avenge injuries suffered through violations thereof. While this is a federally accorded right of action, at the present time private treble-damage cases are governed by State statutes of limitation.
>
> "Under this ruling a number of anomalous situations may arise. A plaintiff located in State A who is injured by a conspiracy may find himself barred by the local statute of repose, whereas an injured party in State B, wronged by the very same collusive action, may still have a valid cause of action. While this may be unjust insofar as plaintiffs are concerned, defendants fare little better under the rule. When conspiracies occur on a nationwide level and it is determined that the limitation law of the place of injury governs the case, a plaintiff injured in several jurisdictions is permitted to select as his forum the State with the most favorable statute. In such cases, the defendant remains in constant jeopardy until the longest period of limitations has transpired. Also adding to the confusion is the frequently present problem of a conflict of laws in determining which State statute is controlling, the law of the forum or that of the situs of the injury.
>
> "Even when the State whose statute of limitations is applicable has finally been ascertained, there remains still another

To eliminate this confusion the Act established a uniform statute of limitations of 4 years and provided the suspension of the statute would extend "during the pendency" of the federal civil or criminal proceeding and "for one year thereafter." Finally, the Act provided that, in the event the new uniform 4-year statute is tolled, "any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." In this manner the termination date of the limitations period was designed to afford private litigants an opportunity to take advantage of the government's efforts and to make its calculation reasonably certain.[3]

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hurdle to be overcome, namely the selection of the appropriate law of the State that governs private triple-damage proceedings. The problem is complicated in many instances by virtue of the fact that statutes of limitation must frequently be chosen from those pertaining to the ancient common-law forms of action such as trespass to persons and property, damage to property, and actions in the nature of actions on the case. In those instances where the State law has established a special statute of limitations for actions upon a liability created by statute, the selection of the proper limitation period may be immeasurably easier. Even here, however, confusion as to the correct limitation period abounds.

"It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble damage actions as well as Government damage actions, of 4 years."

[3] S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S. Code Cong. & Admin. News, pp. 2330, 2332.

"This bill makes several important changes in the tolling provisions of existing law. As presently written section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

[Footnote continued on page 7a]

We, therefore, in interpreting section 16(i) must be guided by a Congressional intent not only to aid private litigants but also to make reasonably certain and predictable the determination of the duration within which a private antitrust suit must be brought. Our interpretation is important because, not only will it fix the period within which a suit may be brought, it also will affect, by fixing the duration of the period of suspension, the period of time with respect to which damages may be recoverable.

II.

Plaintiff's Interpretation Inconsistent With Section 16(b)'s Statute-of-Repose Purpose.

[1, 2] Plaintiff in effect argues that any interpretation which will extend the period within which a private suit can be brought serves to aid private litigants and is thus an interpretation intended by Congress. As indicated above, this ignores the statute-of-repose purpose of section 16(i). To serve that purpose we should eschew an interpretation which could introduce at another critical point in the calculation of the total period within which a suit

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[3] [Continued]

"There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings."

may be brought a degree of uncertainty even greater than that which Congress eliminated in 1955. Plaintiff's expansive reading of Congressional intent undoubtedly would lead to just that. In calculating the expiration point of the time within which a suit may be brought, uncertainty about when suspension of the running of the four-year statute commences would be as troublesome as were the uncertainties to which the 1955 Act was addressed.

Our description of the plaintiff's argument is not a strawman we have devised to conceal the force of his position. It is true that the date of empanelling is a fixed and certain date. The difficulty with its selection is that it bears no logical relationship to an event to which we can attach the statutory language "Whenever any civil or criminal proceeding is instituted to prevent, restrain, or punish violation of any of the trust laws, . . ." Proceedings are "instituted" either before or after empanelling of the grand jury. Mere empanelling "institutes" nothing. It is either commencing the investigation, presenting to the grand jury, or returning the indictment that does that. If empanelling should be deemed meaningful *only* when an indictment ultimately is returned, it is the indictment which is the operative "institution" of proceedings, not the empanelling of the grand jury. To relate the date of the suspension back to the empanelling of the grand jury makes no more sense than relating it back to the date final administrative approval of the prosecution was given or any other earlier date with respect to which there exists proof that the government had determined to investigate possible antitrust violations by the defendant. On the other hand, if the date the grand jury is empanelled is deemed meaningful even if no indictment is returned then it is clear that it is merely an arbitrary date selected to signify that at some prior date the government decided to investigate the defendant for antitrust violations.

The short of the matter is that there exists little reason, other than that it fits the needs of the plaintiff's case, to accept the date of grand jury empanelling as the date suspension commences. The date of the return of an indictment fits comfortably within the statutory language while empanelling the grand jury does not. The latter is not an act having as its purpose the prevention, restraint, or punishment of violations of the anti-trust laws. The initiation of an investigation or a decision to prosecute more comfortably fits the statutory language than does empanelling the grand jury. Were we to select empanelling today, these more appropriate times would be selected tomorrow. To select either, however, would introduce great uncertainty in fixing the time at which the suspension period commences. This would frustrate the statute-of-repose purpose of section 16(i). We decline to embark on a course that could lead to such an end.

III.

Practical Difficulties In Accepting Plaintiff's Position.

In reaching our conclusion we have also been influenced by a desire to avoid certain practical difficulties relating to grand jury secrecy which the plaintiff's position would involve. See Rule 6(e), Fed.R.Crim.P. (as amended Oct. 1, 1977). Section 16(i) suspends the limitation period "in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding . . .." To determine whether proceedings before a grand jury involved "any matter complained of" upon which a private right of action is based in whole or in part, grand jury proceedings would be required to be carefully scrutinized. Moreover, considerable judicial time would be consumed in striking the exquisite balance between serving the objects

of grand jury secrecy on the one hand and those of section 16(i), as interpreted by the Supreme Court in *Minnesota Mining Co.*, on the other. *Cf. U. S. Industries, Inc.* v. *United States District Court*, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965). This task would be especially difficult when no indictment of the antitrust defendant was returned. Plaintiff suggests an *in camera* proceeding (initiated undoubtedly in some instances by no more than uninformed suspicion) in which the trial court would sift the grand jury proceedings for "any matter complained of" on which the plaintiff's suit might be based. To an impractical degree the plaintiff's position imposes upon the trial court a highly complex and difficult task whereas that task is relatively simple so long as we adhere to the date an indictment is returned as the date criminal proceedings which suspend the 4-year limitation period commence. *See State of Michigan* v. *Morton Salt Co.*, 259 F.Supp. 35, 45 (D.Minn. 1966). Adherence to such a date may not eliminate all necessity to strike the exquisite balance in view of the teaching of *Minnesota Mining, Inc.* and *Leh* v. *General Petroleum Corp.*, 382 U.S. 54, 58-59, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965); but it does confine the task to substantially more manageable proportions than would otherwise be the case.

Concerns rooted in a desire to improve judicial efficiency must occupy a low order of priority when either the commands of Congress or the insistent summons of justice so indicate; however, they occupy a high order when neither so do. This is the situation which this case presents.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRIC COURT
NORTHERN DISTRICT OF CALIFNORNIA

No. C-75-1757 ACW

J. M. DUNGAN, as Trustee for ABC Towing Service of Salinas, Inc., a bankrupt corporation,

Plaintiff,

vs.

MORGAN DRIVE-AWAY, INC., NATIONAL TRAILER CONVOY, INC., and TRANSIT HOMES, INC.,

Defendants.

[Filed June 23, 1976]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is an antitrust action brought by the trustee in Bankruptcy for ABC Towing Service of Salinas, Inc., against three companies engaged in the mobile home transportation business. Defendants have moved for summary judgment on the ground that plaintiff's claims are barred by the statute of limitations.

The last date upon which plaintiff's cause of action could accrue was April 23, 1969, the date ABC Towing Service of Salinas ceased doing business and filed its bankruptcy petition. This action was filed on August 20, 1975, well over the four-year period allowed by the statute of limitations, 15 U.S.C. § 15b.

The complaint asserts that under the provisions of 15 U.S.C. § 16(b), the institution of criminal proceedings against the defendants on August 2, 1973, and the subsequent institution of a government civil antitrust suit against the defendants suspended the operation of the statute of limitations. Since the criminal case began over four years after plaintiff's claims accrued, however, the indictment of the defendants in August, 1973, came too late to allow plaintiff the benefits of 15 U.S.C. § 16(b).

Recognizing this dilemma, plaintiff now asserts that the February 7, 1972, empanelling of the grand jury which ultimately returned the August, 1973, indictment tolled that statute of limitations. This position must be rejected.

A grand jury is an investigative body. That a special grand jury [1] may not be convened until after the government's investigation of a particular matter is well advanced does not change the nature of the grand jury's activity, for a special grand jury is not required to be satisfied with the government's initial presentation nor is it required to indict those accused by the government. Even if indictments are eventually returned, the grand jury itself has no power to "prevent, restrain, or punish" for violations of antitrust or related statutes. Proceedings before grand juries are not the type of proceedings contemplated by 15 U.S.C. § 16(d). See *State of Michigan* v. *Morton Salt Company*, 259 F.Supp. 35, 44 (D.Minn. 1966), *affirmed on other grounds sub nom. Hardy Salt Co.* v. *State of Illinois*, 377 F.2d 768 (8th Cir. 1967).

This conclusion is reinforced by the secret nature of grand jury deliberations. In order to effectively apply

[1] Contrary to the implication in plaintiff's brief, there is no indication in the record that the grand jury that indicted the defendants was a special grand jury within the meaning of 18 U.S.C. §§ 3331-3334. In any event, the relevant considerations are the same whether or not a regular or special grand jury is involved.

15 U.S.C. § 16(b) as plaintiff contends, this traditional element of secrecy would have to be eliminated in every private antitrust case where there was a previous grand jury proceeding. The statute of limitations would be tolled for private suits based on "any matter complained of" before the grand jury. Where no indictments are returned, the grand jury proceedings would have to be made public in order to determine if anything relating to antitrust matters was presented to the grand jury. Even when indictments were returned, the grand jury proceedings would have to be made public in order to determine whether there were any other matters that a private plaintiff may make the subject of litigation, for it cannot be assumed that indictments cover every area presented for the grand jury's consideration.[2] In addition, if private antitrust litigants are to receive any benefits from the institution of grand jury proceedings other than the mere extension of the statute of limitations, they would have to be given access to the material presented to the grand jury. *Cf. Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, (1965).

These rationales for disclosure would apply in all cases —it would make no difference whether the plaintiff would, as here, be otherwise barred by the statute of limitations or whether there was an otherwise diligent plaintiff who wished to extend a defendant's liability as far back in time or to as many areas of business practice as possible. Plaintiff points out that grand jury secrecy is not absolute and that access to materials presented to the grand jury has been given to private antitrust litigants in the past. Such disclosures, however, normally involve considerations

[2] Similarly, in order to set the appropriate limitations period, the proceedings of the grand jury would have to be examined to determine exactly when the investigation of a particular matter began and, in a case where no indictments are returned, when that investigation ended.

particular to each case. *U.S. Industries, Inc.* v. *United States District Court*, 345 F.2d 18 (9th Cir. 1965). Plaintiff's position, on the other hand, would require disclosure as a routine matter, but plaintiff has not shown that such a change in traditional considerations of secrecy in grand jury matters was contemplated by the enactment of 15 U.S.C. § 16(b).[3]

The complaint also alleges that plaintiff had no knowledge of any antitrust violations until the criminal proceedings were instituted by the government and that defendants had fraudulently concealed their violations of the antitrust laws.[4] Under this theory, plaintiff must show that defendants concealed the basic facts that would have revealed the existence of antitrust violations *and* that plaintiffs, although exercising due diligence, failed to discover those facts during the limitations period. *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 460-461 (2d Cir. 1974); *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975).

Through the deposition testimony of the two men most extensively involved with the business affairs of ABC Towing Service of Salinas, defendants have shown that the basic facts underlying the present antitrust claims were known, or should have been known, by these two men before or during the four-year limitation period ending April 23, 1973. Plaintiff has not produced any affidavits or other material that conflicts with defendants'

[3] The limited nature of the reports that may be issued by special grand juries, 18 U.S.C. § 3333, does not modify this conclusion.

[4] The conclusory allegations of the complaint fail to meet the requirement of Federal Rules of Civil Procedure Rule 9(b) that "the circumstances constituting fraud . . . shall be stated with particularity". *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975). In view of defendants' presentation in support of their motion for summary judgment, however, there is no need to require an amended complaint.

characterization of the deposition testimony. Summary judgment in favor of defendants on this issue is therefore appropriate.

Accordingly, It Is Hereby Ordered that defendant's motion for summary judgment is GRANTED, and that plaintiff's action is DISMISSED.

Dated: June 23, 1976.

Albert C. Wollenberg
United States District Judge

APPENDIX C

CLAYTON ACT, SECTION 5, AS AMENDED (15 U.S.C. § 16)

§ 16. Judgments—Prima facie evidence

* * * *

Suspensions of limitations

* * * *

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued. As amended Dec. 21, 1974, Pub.L. 93-528, § 2, 88 Stat. 1706; Sept. 30, 1976, Pub.L. 94-435, Title III, § 302(2), 90 Stat. 1396.